UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	Civil Action No. H-01-3624 **(Consolidated)**
This Document Relates To:	CLASS ACTION
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. KENNETH L. LAY, et al., Defendants.	

LEAD PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

1627

TABLE OF CONTENTS

I. INTRODUCTION

In July 2002, the Bank Defendants and the Outside Directors propounded onerous "class certification" discovery, seeking depositions of two individual Regents of the University of California ("The Regents"), five individuals from The Regents' Office of the Treasurer, and 30(b)(6) depositions on four topics, including the "decision" to become a class representative, all actions taken to date to "manage and control" the litigation, and any class action lawsuit in which an institution was a named party or a class representative. In all, defendants noticed a minimum of 29 depositions over five business days, purportedly for "class certification."

In August 2002, The Regents, moved for a protective order on the basis that a single 30(b)(6) deposition from each institutional plaintiff was sufficient for defendants' inquiry into class certification issues. The Regents asserted defendants were not entitled to discovery concerning The Regents' decision to retain counsel, file suit, or other, non-Enron class action litigation. However, The Regents offered a Rule 30(b)(6) designee, Mr. Jeffrey Heil, who was the Managing Director of The Regents' public equity portfolio during the purchases of Enron securities. As The Regents stated, Mr. Heil would provide testimony concerning the implementation and execution of The Regents' investment policies as they pertain to Enron, the decisions to purchase Enron's securities, and the information upon which those decisions were based.[1]

On March 28, 2003, the Court granted The Regents' motion and held that "the designation of Jeffrey Heil ... under Fed. R. Civ. P. 30(b)(6) is sufficient" and the other deposition discovery sought by defendants was "not relevant to ... class certification issues." Hodges Decl., Ex. F at 1-2. That was almost five months ago. Since then, defendants have left outstanding their Rule 30(b)(6) deposition notices, which contain some deposition topics not ruled irrelevant by the Court. They are for example, "[p]urchase or sales ... of Enron-Related Securities, Investments or Contracts ... and the reason for each decision to purchase or to sell." Mr. Heil has long been scheduled to provide the

---

[1] *See* Hearing Transcript dated March 27, 2003, at 37-38, 40-41, 43-44 (Declaration of Helen J. Hodges ("Hodges Decl."), Ex. K (filed herewith); Lead Plaintiff's Motion for Protective Order filed August 13, 2002 at 1-2, 6, 9-10.

Rule 30(b)(6) deposition testimony for The Regents on August 25, 2003, and the deposition will proceed accordingly.

Now, just a few weeks before the scheduled close of class certification discovery and days before Mr. Heil's deposition, defendant Frevert has noticed ***another*** Rule 30(b)(6) deposition on August 25, 2003, again for testimony concerning irrelevant topics. The following excerpts from six densely worded topics in Frevert's deposition notice only begin to demonstrate the ambiguity, vagueness, overbreadth, and irrelevance of the subjects for which Frevert seeks testimony:

- "The decision by the Regents to enter into the Direct Access Services Agreement by and between The Regents ... and Enron Energy Services ...."
- "The nature and quality of the services offered or rendered by Enron Energy Services, Inc. pursuant to the Energy Services Contract ...."
- "The knowledge or information of any person involved in (or having responsibility for) the Regents' investment decisions ...."

Hodges Decl., Ex. A. Frevert's counsel claims his last minute barrage of discovery, in part arising out of an electricity contract dispute between The Regents and Enron Energy Services ("EES"), relates to the "typicality" prong of Rule 23. *See* Hodges Decl., Ex. G And defendant Lou L. Pai's counsel and Frevert's counsel have gone so far as to threaten cancellation of Mr. Heil's deposition unless The Regents capitulates to their vexatious demands.

Topic numbers one through three of Frevert's deposition notice, however, do not relate to "typicality" or "adequacy" or any other Rule 23 prerequisite. *See* Hodges Decl., Ex. A. Indeed, the University's electricity contract with EES has nothing whatsoever to do with the subject matter of this litigation. *See infra* §III.A.

Topic numbers four through six of Frevert's deposition notice implicitly seek multiple individual depositions by requesting the "knowledge or information of any person." *See* Hodges Decl., Ex. A. Nonetheless, to the extent they are not overbroad and can be understood to seek discovery relevant to class certification issues of the typicality of The Regents' claims or the adequacy of representation, these topics will be responded to by the testimony of Mr. Heil. *See* Hodges Decl., Ex. J.

The Court's March 28, 2003 ruling on The Regents' motion for protective order was clear: the deposition testimony of The Regents' 30(b)(6) designee concerning Enron securities transactions is sufficient for purposes of class certification. Messrs. Frevert and Pai simply are not entitled to harass The Regents with deposition topics beyond the scope of class certification. Therefore, The Regents requests a protective order disallowing defendants from seeking another Rule 30(b)(6) deposition, concerning the University's electricity contract, and limiting class certification discovery to ***relevant*** issues of typicality and adequacy, in accordance with the Court's previous Order.

II. STATEMENT OF CONFERENCE

In accordance with Rule 26(c) and this Court's Procedures Manual, §IV.D., counsel for Lead Plaintiff conferred with Messrs. Frevert's and Pai's counsel in an attempt to resolve the dispute. On August 18, 2003, defendant Frevert served his Rule 30(b)(6) notice. Hodges Decl., Ex. A. One day later, on August 19, 2003, counsel for defendant Pai, Ms. Deborah Jeffrey, wrote to Ms. Helen Hodges, counsel for The Regents, claiming "the defendants cannot adequately prepare" for Mr. Heil's deposition because documents concerning a 1998 energy contract have yet to be produced. Hodges Decl., Ex. B. Ms. Jeffrey stated Mr. Heil's deposition may need to be postponed. Later that day, on August 19, 2003, Ms. Hodges wrote to Ms. Jeffrey, stating defense counsel were made aware in August 2002 that The Regents' 30(b)(6) designee, Mr. Heil, would provide testimony concerning The Regents' decisions to purchase Enron securities. Hodges Decl., Ex. C. Ms. Hodges added (a) Mr. Heil never was designated a person most knowledgeable concerning the University's 1998 energy contract with Enron, (b) The Regents' Office of the Treasurer has no responsive documents concerning the energy contract, (c) defense counsel have had relevant documents for Mr. Heil's deposition for months; and (d) Mr. Heil's deposition will go forward on August 25, 2003 in accordance with counsel's prior agreement.

Also on August 19, 2003, Ms. Hodges wrote to counsel for defendant Frevert, Mr. JC Nickens, stating Frevert's deposition notice seeking testimony on six subjects in just seven days was noticed without consulting Lead Counsel, despite the fact defense counsel were in constant contact with Paul Howes of Milberg Weiss concerning ongoing class representative depositions. Hodges Decl., Ex. D. Ms. Hodges informed Mr. Nickens that on August 25, 2003, Mr. Heil will provide

deposition testimony in accordance with the Court's March 28, 2003 Order, no one else will appear on August 25 to testify on other topics, and The Regents will move for a protective order.

On August 20, 2003, Mr. Nickens responded to Ms. Hodges August 19 letter, stating he and Ms. Jeffrey opposed the motion for protective order and stated the topics in defendant Frevert's 30(b)(6) notice were "appropriate for class certification, particularly focused on the typicality requirement." Hodges Decl., Ex. G. In response, Ms. Hodges stated defendants failed to timely follow up on The Regents' two-month-old document production and thus Mr. Heil's deposition should go forward. Ms. Hodges informed defense counsel they may question Mr. Heil concerning Frevert's six topics, but The Regents would not designate him for all the topics. On August 21, 2003, Mr. Nickens agreed to proceed with Mr. Heil's deposition on August 25, 2003. Later that day on August 21, Ms. Hodges wrote to Mr. Nickens, informing him Frevert's deposition topics four through six are vague, ambiguous and nonsensical. Ms. Hodges further informed Mr. Nickens testimony would be provided in response to the deposition notice, subject to The Regents' objections. Correspondence regarding these discussions is attached to the Hodges Declaration as Exhibits B-D, G-J. Counsel were unable to reach an agreement.

III. A PROTECTIVE ORDER SHOULD ISSUE TO LIMIT DEFENDANT FREVERT'S VEXATIOUS DISCOVERY

Federal Rule of Civil Procedure 26(c) authorizes district courts to issue protective orders to shield persons from "annoyance, embarrassment, oppression, or undue burden or expense" due to abusive discovery. The Court has broad discretion to limit the scope of discovery. *See Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976) ("We have constantly emphasized the broad discretion which a district judge may properly exercise in discovery matters."). A district court's entry of a protective order will be reversed only for a "clear abuse" of that discretion. *See Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 856 (5th Cir. 2000) (district courts have "'broad discretion in all discovery matters' and 'such discretion will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse'") (citation omitted).

As previously discussed, on August 13, 2002, The Regents moved for a protective order on behalf of institutional and individual class representatives to limit defendants' abusive deposition

practice, including noticing repetitive, wasteful depositions under the guise of "class certification" discovery. A single person-most-knowledgeable deposition from each institutional investor, together with a deposition from each individual investor, The Regents asserted, was ample class certification discovery. The Court agreed.

> The Court finds that the designation of Jeffrey Heil as the most knowledgeable individual of the Regents under Fed. R. Civ. P. 30(b)(6) is sufficient, and that the reasons why the banking defendants wish to depose other officers, directors or agents of Lead Plaintiff the Regents of the University of California ... are not relevant to the ***class certification issues*** of the ***typicality of the Regents' claims*** or the adequacy of representation.

Hodges Decl., Ex. F at 1-2 (emphasis added).

Although the Court took care to explain permissible class certification discovery must be ***relevant*** to typicality or adequacy, this has not deterred Frevert from noticing irrelevant depositions or disrupting the class certification discovery schedule. Frevert's notice shows his topics have ***nothing*** to do with the typicality of The Regents' claims.

A. Deposition Testimony Frevert Seeks Concerning The University's Electricity Contract With EES Is Irrelevant to Class Certification and Totally Unrelated to the Enron Fraud

Frevert's first three topics in his Rule 30(b)(6) notice concern a February 1998 contract between the University and EES for the purchase of discounted electricity and ancillary services such as scheduling, metering and billing. *See* Hodges Decl., Ex. A. In February 2001, EES transferred the University from "Direct Access" electricity service to utility "Default Service." A dispute ensued, which could not be resolved, and in March 2001, the University sued EES for specific performance, breach of contract, and declaratory relief. *See* Hodges Decl., Ex. E. Frevert purports to seek "Rule 23 typicality" discovery concerning the University's decision to enter into the 1998 agreement, disputes arising from the agreement, and "meetings" between University employees and EES.

The 1998 energy contract has no bearing on the typicality of The Regents' claims in this action. Rule 23(a)(3) requires class representatives to present claims that are typical of the class. "The test for typicality, like the test for commonality, is not demanding." *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997). The Court need only focus on the "legal and remedial

theories of the named plaintiffs and the class members they seek to represent." *Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 569 (S.D. Tex. 2000). "'The proper inquiry is whether other members of the class have the same or similar injury, whether the action is based on conduct not special or unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Longden v. Sunderman*, 123 F.R.D. 547, 556 (N.D. Tex. 1998) (citation omitted). The typicality "requirement ... does not mean that all claims must be identical." *Phillips v. Joint Legislative Comm. on Performance & Expenditure Review*, 637 F.2d 1014, 1024 (5th Cir. 1981). *Accord Ligon v. Frito-Lay, Inc.*, 82 F.R.D. 42, 47 (N.D. Tex. 1979) ("'A class representative and a class member must be similarly, not identically, situated.'") (citation omitted). "In fact, the named representatives only need to be adequate and do not need to be the best or most typical of all possible representatives." *In re Oxford Health Plans, Inc. Sec. Litig.*, 199 F.R.D. 119, 123 (S.D N.Y. 2001).

The University's contract dispute with EES – concerning the unilateral movement from Direct Access to utility default service – bears no resemblance to the "legal and remedial" theories in the Enron securities litigation and is irrelevant to whether The Regents and class members suffered "similar" securities fraud injuries. *Henry*, 199 F.R.D. at 569; *Longden*, 123 F.R.D. at 556. Accordingly, Frevert's first three topics "are not relevant to the class certification issues of the typicality of the Regents' claims or the adequacy of representation." Hodges Decl., Ex F at 2

B. Lead Plaintiff Has Already Provided Discovery – More Than Required – Concerning the University's Electricity Contract

Notwithstanding the fact this discovery will lead to a dead-end, The Regents has taken a number of steps to provide defendants with discovery concerning the 1998 electricity contract with EES. In July, The Regents was served with copious discovery concerning the contract. The Regents answered voluminous requests for admissions, which required examination of five volumes of exhibits, responded to document production requests and answered interrogatories. The Regents is further collecting the responsive, non-privileged documents concerning the energy contract it agreed to produce and expects to produce the documents within two weeks. The Court should prohibit defendants from abusing the deposition process by harassing plaintiffs about this irrelevant matter. *See, e.g., Epstein v. MCA*, 54 F.3d 1422, 1423 (9th Cir. 1995) ("Any information [defendant]

may have gleaned from these discovery requests would have no bearing on either the merits of the case or the motion for class certification ....").

IV. CONCLUSION

As this Court previously held, The Regents' designation of Mr. Heil under Rule 30(b)(6) is sufficient for class certification discovery. Frevert's notice for another Rule 30(b)(6) deposition, concerning the University's electricity contract, contradicts the Court's March 28, 2003 Order. For all the reasons stated herein, The Regents requests a protective order limiting Frevert's 30(b)(6) deposition to the person most knowledgeable regarding The Regents' purchases of Enron stock and the information upon which those decisions were based.

DATED: August 22, 2003

Respectfully submitted,

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
WILLIAM S. LERACH
DARREN J. ROBBINS
HELEN J. HODGES
BYRON S. GEORGIOU
G. PAUL HOWES
JAMES I. JACONETTE
MICHELLE M. CICCARELLI
JAMES R. HAIL
JOHN A. LOWTHER
ALEXANDRA S. BERNAY
MATTHEW P. SIBEN
ROBERT R. HENSSLER, JR.

Helen J. Hodges *by permission

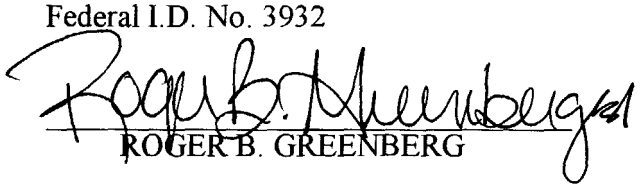
HELEN J. HODGES

401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/231-1058

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
STEVEN G. SCHULMAN
One Pennsylvania Plaza
New York, NY 10119-1065
Telephone: 212/594-5300

Lead Counsel for Plaintiffs

SCHWARTZ, JUNELL, CAMPBELL
& OATHOUT, LLP
ROGER B. GREENBERG
State Bar No. 08390000
Federal I.D. No. 3932



ROGER B. GREENBERG

Two Houston Center
909 Fannin, Suite 2000
Houston, TX 77010
Telephone: 713/752-0017

HOEFFNER & BILEK, LLP
THOMAS E. BILEK
Federal Bar No. 9338
State Bar No. 02313525
440 Louisiana, Suite 720
Houston, TX 77002
Telephone: 713/227-7720

Attorneys in Charge

BERGER & MONTAGUE, P.C.
SHERRIE R. SAVETT
1622 Locust Street
Philadelphia, PA 19103
Telephone: 215/875-3000

Attorneys for Staro Asset Management

WOLF POPPER LLP
ROBERT C. FINKEL
845 Third Avenue
New York, NY 10022
Telephone: 212/759-4600

SHAPIRO HABER & URMY LLP
THOMAS G. SHAPIRO
75 State Street
Boston, MA 02109
Telephone: 617/439-3939

Attorneys for Nathaniel Pulsifer

SCOTT & SCOTT, LLC
DAVID R. SCOTT
NEIL ROTHSTEIN
S. EDWARD SARSKAS
108 Norwich Avenue
Colchester, CT 06415
Telephone: 860/537-3818

Attorneys for the Archdiocese of Milwaukee Supporting Fund, Inc.

LAW OFFICES OF JONATHAN D. McCUE
JONATHAN D. McCUE
4299 Avati Drive
San Diego, CA 92117
Telephone: 858/272-0454

Attorneys for Imperial County Board of Retirement

CUNEO WALDMAN & GILBERT, LLP
JONATHAN W. CUNEO
MICHAEL G. LENETT
317 Massachusetts Avenue, N.E.
Suite 300
Washington, D.C. 20002
Telephone: 202/789-3960

Washington Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S MOTION FOR PROTECTIVE ORDER document has been served by sending a copy via electronic mail to serve@ESL3624.com on this 22nd day of August, 2003.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S MOTION FOR PROTECTIVE ORDER document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 22nd day of August, 2003.

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, 21st Floor
New York, NY 10004

Mo Maloney